

October 4, 2010

Take a Break from Health Care Reform. Last Chance to Correct Section 409A Failures Without Penalty.

This year employers have been focused on health care reform. The major health care reform issues include grandfathered plan status, enrollment of adult children, and the elimination of annual and lifetime limits.

Now that your group health plan's open enrollment materials for 2011 are finalized, you have a moment to refocus on your nonqualified deferred compensation arrangements. These arrangements include:

- Traditional top-hat deferred compensation plans
- Supplemental executive retirement plans (SERPs)
- Supplemental savings plans
- Certain equity awards
- Severance plans
- Certain employment and severance agreements
- Change in control agreements and plans

On January 5, 2010, the Internal Revenue Service issued Notice 2010-6, which provides methods that employers can use to voluntarily correct plan document failures under Section 409A of the Internal Revenue Code of 1986, as amended ("Section 409A"). Although the notice provides long-term relief, certain document failures that are corrected **before the end of 2010** generally are treated as if the failure never occurred.



Related practice areas:

[Employee Benefits and Executive Compensation](#)

For more information, please contact any of the individuals listed below:

David P. Doyle ^{NJ}
[ddoyle@daypitney.com](mailto:doyoyle@daypitney.com)
(973) 966 8136

Sabino (Rod) Rodriguez ^{NY, CT}
srodriguez@daypitney.com
(212) 297 2454

Susan M. Szafranski ^{NJ, NY}
sszafranski@daypitney.com
(973) 966 8247

Common plan document failures include:

- Impermissible or absence of a payment date or payment event
- Impermissible payment form
- Impermissible definition of termination from employment
- Impermissible definition of change in control
- Absence of six-month delay for payments made on account of termination
- Employer discretion to determine timing and/or form of payment

It is prudent to review all of your nonqualified deferred compensation arrangements by December 31, 2010, to ensure that they are compliant with Section 409A. You can never be too careful given that the consequences of a plan document failure can be significant for affected employees.

Please call a member of the firm's employee benefit and executive compensation group if you have any questions or would like us to review your nonqualified deferred compensation arrangements for Section 409A compliance.

Bar Admissions: Connecticut^{CT} New Jersey^{NJ} New York^{NY}

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